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No. 84-1905

In the Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

BUENTA M. OWENS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANT

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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I.

We have demonstrated in our opening brief that the distinction Congress drew, during the years from 1979 through 1983, between widowed spouses and divorced spouses with respect to their eligibility for secondary Social Security benefits upon remarriage was plainly rational. From the time that Congress first provided for secondary benefits in 1939, it has treated spouses who remained married differently from those who divorced. This Court unanimously sustained the constitutionality of that distinction in *Mathews* v. *De Castro*, 429 U.S. 181 (1976), concluding that "Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married" (*id.* at 188). It was not "patently arbitrary" (*Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960)) for

Congress to invoke that distinction in 1977 for purposes of determining continued eligibility for survivor's benefits upon remarriage. Appellees' contrary submission is without merit.

A. Appellees first maintain (Br. 15-20) that the Court should subject the statutory classification to heightened scrutiny. However, as the district court recognized (J.S. App. 37a), this Court already has held that classifications based on divorced status must be sustained if they satisfy the rational basis test. *De Castro,* 429 U.S. at 185, 188-189.

1. Appellees nevertheless argue that "more demanding scrutiny" is required because the legislative history of the 1977 amendments does not sufficiently identify Congress's reasons for declining to extend survivor's benefits to divorced spouses who remarry. Br. 16-17, quoting *Schweiker* v. *Wilson,* 450 U.S. 221, 243-245 (1981) (Powell, J., dissenting). But "[w]here, as here, there are plausible reasons for Congress' action, [the Court's] inquiry is at an end. It is, of course, 'constitutionally irrelevant whether [those reasons] in fact underlay the legislative decision,' *Flemming* v. *Nestor,* 363 U.S. at 612, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." *United States Railroad Retirement Board* v. *Fritz,* 449 U.S. 166, 179 (1980). In any event, this is not a case in which Congress's purposes must be left to speculation. They are "implicit in the statutory scheme itself" (*Schweiker* v. *Wilson,* 450 U.S. at 244 (Powell, J., dissenting)), in light of the established pattern under the Social Security Act of treating divorced spouses differently from couples who remained married. Moreover, just one year before Congress enacted the 1977 amendments, this Court held in *De Castro* that there is a rational basis for concluding that divorced spouses depend less on each other than do spouses who remain married. It was not necessary for Congress to reiterate that rationale in 1977.

2. Appellees next argue (Br. 18) that heightened scrutiny is appropriate because "the government relies on policy, not fiscal arguments." As we explain below (see page 7, *infra*), there is no basis for appellees' assertion (Br. 18, 28-29) that fiscal concerns did not underlie Congress's decision in 1977 not to extend secondary benefits to divorced spouses who remarried. Moreover, in *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974), the only authority appellees cite for the novel distinction between "fiscal" and "policy" goals (see Br. 18, 29), the Court simply held that the allocation of scarce resources was *not* the purpose of the exclusion of illegimate children (417 U.S. at 633-634). The Court did not suggest that a "fiscal" purpose would have been subject to a lesser degree of scrutiny than the purported "policy" of preventing spurious claims. Appellees' argument also confuses the general purpose of allocating scarce resources to best effectuate the goals of the Social Security program with the praetical decision of how to define eligibility in order to accomplish that goal. The latter decision, made in furtherance of the discretion "to spend money to improve the general public welfare in one way and not another, * * * 'belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.' " *De Castro*, 429 U.S. at 185, quoting *Helvering* v. *Davis*, 301 U.S. 619, 640 (1937).

3. Finally, appellees contend (Br. 18-20, 31, 33) that heightened scrutiny is required because the classification is based on the view that "divorced women are less worthy individuals" (Br. 20) and reflects "archaic prejudices against divorced women" (Br. 33). This assertion cannot be squared with appellees' concession (Mot. to Dis. or Aff. 15) that Congress properly could have declined to extend secondary benefits to *any* divorced spouses. Nor did this Court in *De Castro* intimate any such view of distinctions based on

divorce.[1] As appellees appear to concede, the legislative history contains no evidence of congressional hostility toward divorced women. To the contrary, Congress extended secondary benefits to divorced women in 1965 because of its particular concern for women who had not worked and who might not have the opportunity to earn Social Security protection after their divorce. Similarly, Congress deleted the support requirement in 1972 because of a concern that it had proven to be an unfair barrier for some divorced women. Gov't Br. 25-27; *Califano* v. *Boles*, 443 U.S. 282, 291-292 & n.9 (1979). And of course Congress amended the Act in 1983 to permit the payment of benefits to divorced spouses who remarry after age 60. Gov't Br. 7. Congress's sympathetic response to the needs of divorced men and women fatally undermines appellees' argument for heightened scrutiny. *City of Cleburne* v. *Cleburne Living Center, Inc.*, No. 84-468 (July 1, 1985), slip op. 9-13.

B. Applying the rational basis test, appellees first attempt (Br. 21-24), to avoid the controlling force of this Court's decisions in *De Castro* and *Califano* v. *Jobst*, 434 U.S. 47 (1977). In *Jobst*, the Court upheld as "unquestionably valid" the general rule under the Social Security Act that secondary benefits are automatically terminated upon marriage. 434 U.S. at 54. The ineligibility of appellees to receive survivor's benefits prior to 1984 was but a particular application of that general rule. Appellees' only complaint is that another category of secondary beneficiaries—widowed spouses—were permitted to retain their full eligibility for secondary benefits upon remarriage after age 60. But as the

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[1]Appellees point out (Br. 20 n.8) that the challenged exclusion of divorced spouses who remarried primarily affected women. But as appellees concede (Br. 2 n.1, 20 n.8), the overwhelming majority of *widowed* spouses who received secondary benefits also were women. There accordingly is no basis for inferring that the differing treatment of the two categories was motivated by any animus against women.

Court observed in *Jobst*, "[e]ven if it might have been wiser to take a larger step [in eliminating the marriage rule], the step Congress did take was in the right direction and had no adverse impact on persons like [appellees]." 434 U.S. at 57-58.

Appellees in fact concede the validity of the general marriage rule. But they insist (Br. 24) that Congress did not have a rational basis for excluding divorced spouses from the exception it fashioned for widowed spouses who remarry after age 60. In their view, *De Castro* should be confined to its particular facts, which concerned provisions for the payment of benefits to a married woman under age 62 whose husband retires or becomes disabled if she has a minor or other dependent child in her care, but not to a divorced woman in similar circumstances. Contrary to appellees' contention, *De Castro* does not rest on narrow premises unique to the particular statutory provisions involved. The Court reasoned broadly that "[d]ivorce by its nature works a drastic change in the economic and personal relationship between a husband and wife" and that "Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married." 429 U.S. at 188. See also *Boles*, 443 U.S. at 289-293. That reasoning applies equally here.

Appellees attempt to distinguish *De Castro* on the ground that the exclusion of divorced spouses at issue here was inconsistent with the congressional purpose of extending secondary benefits to widowed spouses who remarry after age 60, which was to eliminate the disincentive to marry. See Br. 22, 32-33. The difficulty with appellees' argument is that a complete effectuation of that congressional purpose would have required elimination of the marriage rule not only for divorced spouses over age 60, as

appellees urge, but for *all* unmarried secondary beneficiaries. Yet in *Jobst,* the Court specifically rejected the notion that the creation of limited exceptions to the general marriage rule required Congress to "entirely repudiate marriage as a terminating event" (434 U.S. at 58).

C. Although appellees previously argued that widowed and divorced spouses "were accorded identical treatment prior to remarriage" (Mot. to Dis. or Aff. 14)—and although the district court's constitutional holding rested on similar premises (J.S. App. 34a-35a, 39a-40a, 42a)—appellees now concede (Br. 25-26) that Congress consistently has distinguished between widowed and divorced spouses with respect to both their initial eligibility for benefits and their continued eligibility upon remarriage. But appellees argue (Br. 26-27) that Congress could not rationally distinguish between these two categories upon remarriage because Congress determined that they had the same degree of dependency upon the wage earner at the time of his death and thereafter were indistinguishable in all "relevant" respects. Appellees have failed to cite *any* evidence of a congressional finding in 1977 that widowed and divorced spouses were equally dependent upon the resources of the wage earner, and the decision in *De Castro,* rendered only a year earlier, rested on a contrary premise.

Thus, the most reasonable explanation is that Congress determined only that the limited category of divorced women to whom it extended wife's and widow's benefits were likely to have been sufficiently dependent upon their former husbands to warrant treating them similarly to widowed spouses for purposes of initial eligibility. Congress reasonably could decide to give effect to the residual differences between these two categories when the divorced wife remarried, concluding that the degree of dependence on the wage earner's resources that had justified extending secondary benefits to certain divorced wives in the first place (see

page 4, *supra*) was sufficiently attentuated by remarriage to warrant termination of eligibility. That action also had the effect of preventing the drain on the trust fund where a divorced wife and widow both receive benefits on the same wage earner's account (see Gov't Br. 31)—a rational basis for Congress's action that appellees do not even mention.

In addition, even the district court, unlike appellees (Br. 28-29), recognized that fiscal concerns led Congress to reject the complete elimination of the marriage rule (applicable to widowed and divorced spouses, as well as other secondary beneficiaries, such as dependent parents and children) that was proposed by the House. As the district court explained, that "broad change" would have added 670,000 new beneficiaries to the rolls at a cost of $1.3 billion annually. J.S. App. 3a-4a, citing H.R. Rep. 95-702, 95th Cong., 1st Sess. Pt. I, at 47-48 (1977), and *id.* Pt. II, at 73. It is not surprising that Congress took a more cautious approach by eliminating the marriage rule only for widowed spouses, for whom it previously had relaxed that rule in 1965. See Gov't Br. 5, 27. Contrary to appellees' assertion (Br. 28-29), the fact that elimination of the marriage rule for divorced spouses would have contributed less than $17 million to the $1.3 billion cost of a complete elimination of the rule does not suggest that Congress's failure to eliminate the rule for all secondary beneficiaries (including divorced spouses) was not based on fiscal concerns.

Appellees also take issue (Br. 29-30) with our argument (Gov't Br. 24-25) that Congress rationally could conclude that spouses who remained married until the time of the wage earner's death had a more substantial claim to benefits than did spouses who were divorced from the wage earner before his death. This conclusion follows, however, from the recognized purpose of the secondary benefits program to afford protection to the wage earner's family and to assure the wage earner that his family will be provided for.

Gov't Br. 22, 30. Divorce severs the family unit for which secondary benefits are intended, and the payment of benefits to the former spouse is not necessary in order to assure the wage earner that family members will be adequately protected. Although Congress nevertheless chose to extend wife's and widow's benefits to certain divorced spouses in 1965, it was not thereby estopped from terminating those benefits upon remarriage. It is common for alimony payments to terminate upon remarriage, and Congress rationally could adopt a parallel rule under the Social Security Act. Gov't Br. 31.[2]

II.

Appellees' argument (Br. 34-47) that the district court properly exercised jurisdiction over the claims of the unnamed class members is equally without merit. The pervasive theme of their argument is that the Court should take a "practical," non- "literal," and "flexible" approach, under which the failure of the unnamed class members to comply with the exhaustion and 60-day filing requirements in 42 U.S.C. 405(g) would be excused in order to permit appellees Buenta and Kenneth Owens to attack the constitutionality

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[2]Contrary to appellees' assertion (Br. 30 & n. 13), it is irrelevant for these purposes that only 14% of divorced women were actually receiving alimony in 1975. The point is that when alimony *is* awarded, payments typically cease upon remarriage. Appellees also err in contending (Br. 30-31) that the analogy to alimony is inapt because this case concerns divorced spouses whose former spouses have died—an event that independently terminates a divorced spouse's entitlement to alimony. In drawing this distinction, appellees presumably concede the constitutionality of the statutory provisions in effect prior to 1984 that terminated a divorced wife's entitlement if she remarried *before* the wage earner died. But if the rationality of that exclusion is conceded, it cannot have been irrational for Congress also to exclude divorced spouses who remarried *after* the wage earner died. In other words, Congress reasonably could conclude that surviving divorced spouses should be treated like other divorced spouses, rather than like widows and widowers.

of the statutory provisions on their behalf. See Br. 38-39, 41, 43 & n.26, 44-46. This Court repeatedly has made clear, however, that in order for a class to be properly certified in an action under 42 U.S.C. 405(g), each of its members must individually satisfy the requirements for judicial review under that section. *Califano* v. *Yamasaki*, 442 U.S. 682, 701, 704 (1979); *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975); *Mathews* v. *Diaz*, 426 U.S. 67, 71 n.3 (1976); *Heckler* v. *Lopez*, 464 U.S. 879, 881 (1983) (Stevens, J., dissenting in part).

Each of the unnamed class members in this case was personally informed that his claim had been denied and that he had 60 days within which to seek further review, but each then failed to exhaust his administrative remedies and seek judicial review. A court has no jurisdiction to order the Secretary to reopen a decision that the claimant has allowed to become final and binding against him before the filing of the class action in question. *Califano* v. *Sanders*, 430 U.S. 99, 108-109 (1977). And there is no suggestion that any unnamed class member ever requested either the Secretary or the court to reopen the decision denying his own claim for benefits. The district court instead ordered that reopening on a nationwide basis at the behest of the two named plaintiffs in this case, who were strangers to the administrative proceedings on the claims involved. Such judicial orders drastically disrupt the repose and orderly processing of claims that Congress and the Secretary have deemed essential to the efficient and fair administration of the Social Security Act. See *id.* at 108.

A. Appellees attempt to avoid the exhaustion default by arguing (Br. 34-37) that the Secretary waived exhaustion for the unnamed class members. Of course appellees do not suggest that the Secretary actually granted a waiver to each such class member. Instead, they argue that because the Secretary entered into a formal agreement with the named

plaintiffs, under which the parties stipulated that exhaustion through the Appeals Council stage would not be necessary, the Secretary should be deemed to have waived exhaustion for the unnamed class members as well. Appellees completely ignore the purpose of the regulations authorizing such waivers, which is to establish a procedure for dispensing with full exhaustion on an *individualized* basis where the Secretary has determined that there are no remaining questions of fact or law in connection with the particular claim and the claimant challenges the constitutionality of the governing statutory provision. The Secretary cannot make that determination on a class-wide basis, and he has not purported to do so here. Nor is there any indication that any unnamed class member ever expressed a desire to challenge the constitutionality of the relevant statutory provisions, which is a prerequisite to invoking the expedited appeals process.

Contrary to appellees' contention (Br. 34-37), the sweeping waiver rule they propose finds no support in *Salfi*, 422 U.S. at 766-767; *Diaz*, 426 U.S. at 72-73, 76-77; or *Califano* v. *Goldfarb*, 430 U.S. 199, 203 n.3 (1977). In those cases, the Court held that the Secretary had waived the exhaustion requirement with respect to a particular named plaintiff. Those narrow holdings do not support a finding of a waiver on a class-wide basis or suggest that an unnamed class member may circumvent the special procedures the Secretary has since established for granting a waiver of the exhaustion requirement where a claimant wishes to challenge the constitutionality of a provision of the Act.[3]

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[3]Contrary to appellees' contention (Br. 36), the Secretary's jurisdictional concession in *Goldfarb* was not made in administrative proceedings; it was made in the jurisdictional statement filed in this Court (at 4 n. 2). That jurisdictional statement stated that "[t]he Secretary is currently considering the promulgation of regulations that will specify the circumstances under which a decision denying benefits without a hearing will be treated as 'final' " (*ibid.*). The Secretary similarly informed

B. Appellees argument (Br. 39-47) that the unnamed class members also should be excused from their failure to comply with the 60-day filing period in 42 U.S.C. 405(g) rests entirely on their characterization of that provision as a "statute of limitations" that is "waivable by the parties" (Br. 39, quoting *Salfi*, 422 U.S. at 764, and *Mathews* v. *Eldridge*, 424 U.S. 319, 328 n.9 (1976)). This argument fails for several reasons. First, there has been no suggestion here that the Secretary has waived the 60-day filing requirement. Accordingly, even assuming that that requirement should be treated as an ordinary statute of limitations, this action is not timely as regards the unnamed class members who received a final decision of the Secretary more than 60 days before the complaint was filed. Second, it is irrelevant whether the 60-day requirement is labeled a "statute of limitations." Similar provisions have been referred to as statutes of limitation in the decisions of this Court holding that in a suit against the sovereign, such a limitation (i) is an explicit condition on Congress's waiver of sovereign immunity and the jurisdiction of the court, (ii) must be strictly construed, and (iii) is not subject to implied exceptions or tolling rules. See *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Soriano* v. *United States*, 352 U.S. 270, 275-276 (1957); *Munro* v. *United States*, 303 U.S. 36,

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the Court of the contemplated regulations in the supplemental brief for the appellant (at 5 n.2) in *Diaz*. Those regulations were promulgated in ~~December~~ November 1975 (see Gov't Br. 38-40; 40 Fed. Reg. 53385), and it was pursuant to those regulations that the Secretary waived full exhaustion on the claims of appellees Buenta and Kenneth Owens (see Gov't Br. 10-11). The Court held in *Salfi* (422 U.S. at 766) that the Secretary may promulgate regulations pursuant to 42 U.S.C. 405(a) to specify when a decision will be regarded as "final" for purposes of 42 U.S.C. 405(g), and such regulations must be sustained unless they are arbitrary and capricious (*Heckler* v. *Campbell*, 461 U.S. 459, 466 (1983)). There has been no suggestion that the expedited appeal regulations are arbitrary and capricious.

40-41 (1938); *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887).[4]

For the foregoing reasons, appellees' reliance (Br. 44) on *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), and *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), is misplaced. Those cases did not involve suits against the federal government to obtain money from the federal treasury. In the absence of express statutory language, judicially fashioned principles of waiver and tolling that ordinarily are applicable in suits against private parties are not incorporated into statutes imposing limitations on the time within which a suit may be brought against the federal government. *Soriano*, 352 U.S. at 275-276; *Munro*, 303 U.S. at 41; *Finn*, 123 U.S. at 233. There is no reason to believe that Congress intended a different result when it enacted 42 U.S.C. 405(g).[5] To the contrary, Congress explicitly provided a mechanism for the *Secretary* to extend the suit-filing period in appropriate circumstances. This express provision for the accommodation of equitable considerations makes it particularly clear that Congress did not authorize judicially fashioned principles of tolling and waiver.

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[4]Contrary to appellees' contention (Br. 40), the conclusion that a person who received a final decision of the Secretary within 60 days of the filing of this suit could properly be included in the class is not based on principles of tolling. For such a person, the class action complaint commences the civil action within 60 days of the final decision on his claim. Justice Stevens' recognition of this point in his partial dissent in *Heckler* v. *Lopez*, 464 U.S. 879, 883 n. 4 (1983), likewise did not rest on principles of tolling.

[5]Appellees' reliance (Br. 45) on *Honda* v. *Clark*, 386 U.S. 484 (1967), is misplaced for the same reason. There, the Court explicitly acknowledged the general rule that principles of waiver and tolling do not apply to statutes of limitations in suits against the federal government. *Id.* at 501. The Court held that those principles were inapplicable only because that case was not one in which "the public treasury was directly affected" (*ibid.*), but was instead a suit by a creditor to participate in the distribution of privately owned assets held by the Alien Property Custodian.

CONCLUSION

For the foregoing reasons and the additional reasons stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

CHARLES FRIED
Solicitor General

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